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No. 87-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON,

Petitioner,

v.

THEODORE B. OLSON, *et alia,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF BURTON D. LINNE, JACK O. SLATER, AND JOHN C. IMLAY IV IN SUPPORT OF PETITIONER

and

BRIEF *AMICI CURIAE*

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Pursuant to Rule 36.1 of the Rules of this Court, Burton D. Linne, Jack O. Slater, and John C. Imlay IV respectfully move for leave to file the annexed brief *amici curiae* in support of petitioner. Petitioner and one of respondents have refused consent for the filing of this brief.

INTEREST OF THE *AMICI CURIAE*

Amici curiae Linne, Slater, and Imlay are quintessential examples of individuals whose fundamental lib-

erties Congress intended to protect through the Ethics in Government Act[1]. Unjustly convicted of mail fraud, conspiracy, and wilfull failure to file tax-returns through the machinations of at least two prosecutors from the Department of Justice and an IRS agent from the Department of the Treasury who successfully conspired to defraud Grand and Petit Juries and a District Court with perjurious testimony and other wrongdoing,[2] these *amici* repeatedly implored officials of the Department of Justice to investigate this miscarriage of justice, expose the malfactors, and ally with them to secure judicial relief. But their entreaties, ultimately reaching even the Solicitor General of the United States, fell upon the deaf ears of conscienceless placemen committed (through reasoning they refuse to elaborate) to cover up the corruption and criminality in their own offices even at the cost of imposing lengthy prison sentences on men they know are innocent victims of a cynical, calculated, and cold-blooded "frame up".

Impecunious, unknown to the public, without friends in the political branches of government, and remindful that the District Court that convicted them and the Court of Appeals that affirmed their convictions had evinced little less hostility to their proclamations of innocence and little more concern with the Gestapo-like manner in which they were "railroaded" than had the Solicitor General and his colleagues, Linne, Slater, and Imlay turned for succor to the Attorney General of the United States, filing a petition therewith under the Ethics in Government Act. This

[1] 28 U.S.C. §§ 49, 591-98.

[2] The facts are set out in the *amici*'s petition for a writ of certiorari, *Linne v. United States*, No. 87-585 (denied 12 January 1988)

petition was pending when the Court of Appeals declared the act unconstitutional on 22 January 1988. The interest of these *amici*, then, in seeing—and, hopefully, significantly assisting in—reversal of the Court of Appeals' erroneous decision is as obvious as it is compelling.

PURPOSE OF THE BRIEF *AMICI CURIAE*

In their brief, Linne, Slater, and Imlay present an analysis of Article II, Section 2 of the Constitution different from, but withal stronger than, that those supporting the validity of the Ethics in Government Act have advanced heretofore. These *amici* submit that their treatment of the issue *sub judice* here will provide this Court with a focus both narrow and sharp that penetrates the smoky rhetoric with which the Court of Appeals has obscured this case and emphasizes the fundamentals of constitutional interpretation that should inform this Court's decision.

WHEREFORE, Linne, Slater, and Imlay pray that this Court grant their motion, and permit the filing of the annexed brief *amici curiae*.

Respectfully submitted,

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Pursuant to a motion for leave to file under Rule 36.1 of the Rules of this Court, Burton D. Linne, Jack O. Slater, and John C. Imlay IV file this brief *amici curiae* in support of petitioner.

INTEREST OF THE *AMICI CURIAE*

The interest of Linne, Slater, and Imlay as *amici curiae* appears in their motion for leave to file this brief, *ante*.

ARGUMENT

I. The Court of Appeals' disdain for the congressional policy-judgment on which the Ethics in Government Act rests has blinded it to the act's necessity and propriety under Article I, Section 8, Clause 18.

The purpose of the Ethics in Government Act is to insulate prosecutorial decisions in the Executive Branch of government, not merely from "the influence of partisan politics",[1] but also and especially from the control of outright criminal cabals that—as the victimization of *amici* Linne, Slater, and Imlay documents—lurk within the Department of Justice, stealthily plotting to destroy innocent Americans with trumpted-up charges, secure in the knowledge that, if discovered, they will be shielded by a "good ol' boy" network of cronies, backscratchers, and bedfellows who have perverted government service into a secret society that enforces, *or violates*, the law as it alone sees fit. Although paying lip-service to the desirability of this goal, the Court of Appeals' opinion nevertheless rides a strong undercurrent of undisguised personal contempt for the congressional judgment that the mechanism embodied in the act is, in fact, necessary (even questioning its efficacy at all).[2] To be sure, the opinion tries to paint over this prejudice with the constitutional whitewash that, whatever the merits of Congress' motives, the strictures of the act offend the President's power to "take Care

[1] Court of Appeals' Slip Opinion ("Slip Op.") at 87.

[2] *E.g.*, *id.* at 60 ("we see no reason why . . ."), 61 ("it is by no means clear to us that . . ."), 61 ("[w]e had not previously thought that . . ."), 62 ("[n]or do we see * * * why . . ."), 63 ("[w]e do not see how . . .").

that the Laws be faithfully executed".[3] But there is too little pigment here to cover the crucial provisions of the Constitution the Court of Appeals struggles to mask.

A. The presidential power to "take Care that the Laws be faithfully executed" reflects the structural principle of separation of constitutional powers. Yet, raised to the position of pre-eminence the Court of Appeals desires, it would undermine, if not overthrow, the coordinate constitutional principle of checks and balances. Revealingly, the Court of Appeals forgets that execution of the law is at once a power *and a duty*, and that first among "the Laws" the President must "take Care * * * be faithfully executed" is the Constitution itself.[4] Moreover, the Constitution explicitly privileges Congress to share in the authority reposed in other branches of the government by empowering it

> [t]o make all Laws which shall be necessary and proper for carrying into Execution * * * all * * * Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.[5]

Thus, the President's power to execute "the Laws" is itself conditioned by and contingent on the exercise of the supervening power of Congress to enact "*all* Laws" it, in its discretion, finds "adapted to the var-

[3] U.S. Const. art. II, § 3.

[4] U.S. Const. art. VI, cl. 2: "This Constitution * * * shall be the supreme Law of the Land * * *."

[5] U.S. Const. art. I, § 8, cl. 18.

ious *crises* of human affairs" that become the subjects of legislation.[6]

B. That corruption in the Executive Branch of the government, and particularly in the Department of Justice, has reached a state of crisis in the last few years no informed person doubts. Indeed, the experience of *amici* Linne, Slater, and Imlay demonstrates how individuals oblivious to duty and unmoved by appeals to decency have obtained critical posts in the Department. The ultimate cause of this degeneration being mankind's fallen nature, one can agree with the Court of Appeals that the danger the Ethics in Government Act addresses is "Inherent indeed!" in our system of government,[7] just as all human failings are. Yet to accept its inherence is not to despair of its eradicability—unless, with the Court of Appeals, one illogically concludes that the Constitution disables Congress from compelling execution of "the Laws" by those duty-bound, but too poltroon or miscreant, to do so.

Although Congress enacts all criminal law of the national government, its role in the enforcement of such law is circumscribed by the constitutional proscription of "Bill[s] of Attainder" and the constitutional limitation on the penalty for impeachment "extend[ing no] further than to removal from Office, and disqualification to hold any Office of honor, Trust or Profit under the Under States".[8] The power to execute the criminal laws resides in the President.[9]

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[6] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

[7] Slip Op. at 65.

[8] U.S. Const. art. I, § 9, cl. 3; art. I, § 3, cl. 7.

[9] U.S. Const. art. II, § 3.

This separation of function does not necessarily imply, however, that Congress lacks authority to enact all laws which "shall be necessary and proper" to compel employment of the presidential power to execute the laws.

Even if the President has "exclusive authority and absolute discretion to decide whether to prosecute a case",[10] he cannot have a further *quantum* of discretion dishonestly, corruptly, or for personal criminal purposes to refuse to exercise his legitimate prosecutorial discretion legitimately. For his constitutional duty to "execut[e]" "the Laws" requires that he do so "faithfully". The President, then, can hardly complain on rational constitutional grounds if Congress enacts a law "for carrying into execution" that duty, not by directing *how* he should exercise his prosecutorial discretion, but merely by guaranteeing that that discretion will be exercised "faithfully" in *some* manner.

Indeed, the supposedly "constitutional" dispute over infringements the Ethics in Government Act allegedly makes on the President's power to "execut[e]" "the Laws" verges on the operationally nonsensical. Through the Attorney General, *the President* decides, apparently in his "absolute discretion", whether grounds exist for appointment of an independent counsel.[11] The court has *no* power to appoint an independent counsel itself,[12] or to remove such counsel from office except when the counsel's investigation is

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[10] United States v. Nixon, 418 U.S. 683, 693 (1974).

[11] 28 U.S.C. § 592(b)(1), (c)(1). *See* Ponzi v. Fessenden, 258 U.S. 254, 262 (1922).

[12] 28 U.S.C. § 592(b)(1).

completed "or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions".[13] Also through the Attorney General, *the President* decides whether grounds exist for removal of an independent counsel.[14] To be sure, removal is limited and subject to judicial review.[15] But the overarching standard of removal is the finding of a "condition that substantially impairs the performance of such independent counsel's duties"[16]—hardly a ground for constitutional complaint by the President if the appointment of the independent counsel is in the first instance "necessary and proper".

True enough, the court and not the President selects the *person* of the independent counsel (although, as noted above, only the President can create the *office*).[17] But this process of selection is self-evidently

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[13] 28 U.S.C. § 596(b)(2). This action, however, returns the case to the President's complete control.

[14] 28 U.S.C. § 596(a)(1).

[15] 28 U.S.C. § 596(a)(3). The Court of Appeals' speculations on the scope of judicial review violate the rule of constitutional interpretation that a statute should be construed, whenever fairly possible, to *avoid* constitutional conflicts. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). There is no reason on the face of the statute—and the Court of Appeals provides none by way of principle or precedent—why the "report specifying the facts found and the ultimate grounds for • • • removal [of an independent counsel]" that section 596(a)(2) requires the Attorney General to submit is not the administrative record to which the reviewing court is confined and which it must scrutinize according to the traditional "arbitrary-and-capricious" standard. *Pace* Slip Op. at 54-55.

[16] 28 U.S.C. § 596(a)(1).

[17] 28 U.S.C. § 593(a), (c).

necessary to guarantee the independence of the individual chosen so as to serve the purpose of the statute. The Court of Appeals' lament that

> the President's capacity to enforce the law is largely dependent upon the identity and caliber of the officers who compose the Executive Branch, and if the President is without the power to appoint, he cannot define the character of his administration[18]

begs the question. For if the President himself, through the Attorney General, has determined that the circumstances demand appointment of an independent counsel, he has "define[d] the character of his administration" so as to warrant the judgment (in both his view and that of Congress) that remedial measures are necessary.

In sum, from the relevant constitutional perspective of Article I, Section 8, Clause 18, the Ethics in Government Act is unassailable.

II. In characterizing the independent counsel as a "principal Officer", the Court of Appeals patently misread Article II, Section 2.

Its ruminations on the expediency of the statute aside, the Court of Appeals' main criticism of the Ethics in Government Act is that the independent counsel, although a "principal Officer", is not nominated by the President and confirmed by the Senate.[19] A literal reading of the Constitution establishes, however, that the independent counsel is an "inferior Officer", whose appointment by the Attorney General

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[18] Slip Op. at 29.

[19] *Id.* at 10-23.

(as to the office) and the court (as to the person) is completely proper.

A. *Pace* the Court of Appeals, Article II, Section 2 is extraordinarily clear in its mandate. The *only* "Officers of the United States" who must be nominated by the President and confirmed by the Senate are those explicitly listed in clause 2 ("Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court") and the class of "other Officers" undefined in that clause. Who are those "other Officers"? First, the "principal Officers" mentioned elsewhere in the Constitution: to wit, "the principal Officer in each of the executive Departments", and "[t]he Judges of the * * * inferior Courts".[20] Second, whatever "Officers" "shall be established by Law" and whom Congress decrees shall be nominated by the President and confirmed by the Senate.

Not surprisingly, this list of "principal Officers" (to give them the name Article II, Section 2, Clause 1 uses) becomes in the "proviso" to Article II, Section 2, Clause 2 the list of "Officers" whom Congress may empower to appoint the "inferior Officers" of the United States.

From this it follows with fairly straightforward constitutional logic that:

1. There are two and only two classes of constitutional "Officers"—"principal Officers" and "inferior Officers".

2. The classification into which an "Officer" falls depends upon his office (in the cases of the President, Judges, and "Heads of Departments") or the mode

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[20] U.S. Const. art. II, § 2, cl. 1; art. III, § 1.

of his appointment (by the President and Senate; or by the President, "the Courts of Law", or the "Heads of Departments" alone, as Congress directs.)

3. "[I]nferior Officers" are not "inferior" perforce of subordination to some "superior", but solely because of the method of their appointment.[21] And,

4. Congress "may by Law vest the Appointment of * * * inferior Officers, *as they think proper*, in" *any* of the "principal Officers" who may exercise appointment-power.

The independent counsel is not one of the "principal Officers" named in Article II, Section 2, Clauses 1 or 2 or in Article III, Section 1. The procedure for appointing the independent counsel mandated by Congress does not provide for presidential nomination and senatorial confirmation. Rather, the independent counsel is appointed by a "Head of [a] Departmen[t]", the Attorney General, as to the office; and by a "Cour[t] of Law", as to the person. The independent counsel, therefore, is an "inferior Officer" of the United States, and can be nothing else, if the constitutional text is to be followed.

B. The bifurcated appointment-procedure the Ethics in Government Act establishes presents no constitutional problem.

First, the plain language of Article II, Section 2, Clause 2 gives Congress unreviewable discretion to

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[21] *See* U.S. Const. art. III, § 1. The "inferior Courts" are certainly not *subordinate*, in any necessary constitutional sense, to the "supreme Court"; for Congress may withhold all appellate supervision of the former from the latter. U.S. Const. art. III, § 2, cl. 2.

lodge the power to appoint "inferior Officers" "in the Courts of Law, or in the Heads of Departments". Here, Congress has lodged the primary power to appoint the office of independent counsel itself in the "Hea[d] of [a] Departmen[t]" (the Attorney General), and the ancillary and dependent power to appoint the person to occupy that office in a "Cour[t] of Law", so as to immunize the appointee from improper pressure or influence.

Second, nothing in Article III precludes conferral upon "the Courts of Law" of the limited appointment-power the act prescribes. Indeed, the interpretation of "[t]he judicial Power" Article III, Section 1 "vest[s]" in the courts most consistent with Article II, Section 2, Clause 2 is that "[t]he judicial Power" of the former section incorporates the appointment-power of the latter clause, by constitutional definition.

Third, such construction of Article II, Section 2, Clause 2 has already received this Court's sanction. In Ex Parte *Siebold*[22], this Court held Congress constitutionally authorized to empower courts to appoint supervisors of elections, whose duties were concededly nonjudicial, but allegedly "entirely executive in their character". Rejecting the contention that "no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department", the Court quoted Article II, Section 2, Clause 2, and then explained that

> [i]t is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or ju-

[22] 100 U.S. 371 (1880).

> dicial, * * * to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution * * *.
>
> * * * [A]s the Constitution stands, the selection of the appointing power * * * is a matter resting in the discretion of Congress. * * * [T]he duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety * * * have been assigned to any other depositary of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.[23]

Siebold, of course, applies quite literally to the instant case: For it cannot be affirmed that the appointment of *the particular individual* to assume the office of independent counsel can "with any greater propriety" be "assigned to any other depositary of official power"—at least not if the congressional purpose is to be served. This case, moreover, is less extreme than *Siebold*, because here the Attorney General himself appoints the office of independent counsel (that is, determines that an independent counsel is necessary), turning over to the court merely the task of selecting the particular individual to fill that office.

[23] *Id.* at 397-98.

And that task is one hardly "incongru[ous]" for courts to perform, if past practices (never seriously challenged) are consulted.[24]

In short, on its face the Constitution sanctions the appointment-procedure of the Ethics in Government Act.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals, and declare the Ethics in Government Act constitutional.

Respectfully submitted,

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[24] *See* 28 U.S.C. § 546(d).